Supreme Court, U.S.
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No. 85-1764

In the Supreme Court of the United States

October Term, 1985

GEORGE D. BUCK,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

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12 pp

QUESTION PRESENTED

WHETHER EVIDENCE OF A PRIOR EXTRINSIC OCCURRENCE, UPON WHICH THE DEFENDANT HAS BEEN TRIED AND ACQUITTED, SHOULD BE ADMISSIBLE AS EVIDENCE TENDING TO PROVE MOTIVE, INTENT, OR ABSENCE OF MISTAKE OR ACCIDENT IN A SUBSEQUENT CRIMINAL TRIAL.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of Kansas, respectfully requests that this Court deny the petition for writ of certiorari.

JURISDICTION

Respondent does not contest jurisdiction of the Supreme Court to decide issues related to double jeopardy as provided by the Fifth and Fourteenth Amendments of the United States Constitution, pursuant to 28 U.S.C. Sec. 1257(3).

REASONS FOR DENYING THE WRIT

Petitioner is not the first defendant to challenge the admissibility of the use of evidence from an acquittal in another prosecution.

State v. Darling, 197 Kan. 471, 419 P.2d 836 (1966) addressed this issue. In *Darling,* the state introduced evidence of a subsequent offense where there had been a charge and acquittal.

The court in *Darling* discussed a leading case, *Taylor v. State,* 174 Ga. 52, 162 S.E. 504 (Ga. Ap. Ct. 1931) overruled on other grounds, *Woods v. State,* 219 Ga. 509, 134 S.E.2d 8 (Ga. Sp. Ct. 1963) which commented that evidence that was insufficient to warrant a conviction may still shed light on a later case. Discussing the double jeopardy aspects *Taylor* made this comment:

> But the courts which have spoken upon the subject have all said, in substance, that he could not be put in jeopardy if a crime of which he has been acquitted, but that he was in jeopardy of the crime for which he was being tried; and that evidence of the transactions which had resulted in his acquittal was admissible if competent to show a fact material to the issue being tried. *Taylor,* 162 S.E. 511, 512.

Here the petitioner was charged with taking indecent liberties with Casey Eppler. He was not charged with crimes involving the Hinkle children. Thus, he was not twice put in jeopardy for the same conduct. Mr. Buck could not have been convicted or penalized for the *Hinkle* offenses in the second trial. See, *Supreme Court's Views of Fifth Amendment's Double Jeopardy Clause Pertaining to or Applied in Federal Criminal Cases,* 50 L.Ed.2d 830.

Petitioner argues that the rule of collateral estoppel applies. He relies on *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), and *Wingate v. Wainwright,* 464 F.2d 209 (5th Cir. 1972).

In *Ashe v. Swenson,* the defendant was acquitted in a robbery involving six victims and three or four robbers. The prosecution could not prove that the defendant was one of the robbers. The issue was identity at the first trial and the State's evidence on that issue was woefully weak. After the acquittal, having used the first case in effect as a "dry run", the prosecution miraculously improved its identity evidence and the defendant was convicted of robbing another of the six victims.

Beginning with the premise that collateral estoppel is an ingredient of the Fifth Amendment guarantee against double jeopardy, the Court defined the former concept:

> It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the parties in any future lawsuit. *Ashe,* 397 U.S. at 443.

The Court went on to explain that:

> . . . the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. *Ashe,* 397 U.S. at 444.

Thus, it is clear there is not an absolute prohibition of acquittal evidence.

In *Ashe,* the issue was identity. The first jury concluded that the defendant was not one of the robbers. Under the precepts of collateral estoppel this precluded the prosecution from trying to show he was one of the

robbers for the *same* criminal conduct. Without a doubt, it would be wrong for the defendant to "run the gauntlet" again based on these facts.

At bar, the *Eppler* case and the *Hinkle* case involve separate instances of criminal conduct. This is not a case where the petitioner was tried and acquitted in the trial of one of the children and later retried for a second child who was present during the same incident.

After *Ashe* and *Wingate v. Wainwright,* Kansas decided *State v. Irons,* 230 Kan. 139, 630 P.2d 1116 (1981). *Irons* discussed both of these cases, followed the principles embodied in their decisions and ruled:

> Generally, it may be said that evidence, otherwise competent, of another crime committed by the accused is not rendered inadmissible per se by the fact the accused was acquitted of such crime. *Irons,* 230 Kan. at 140.

The Kansas court then reviewed *Darling* with approval. The court then extended the "balancing" test of *State v. Bly,* 215 Kan. 168, 523 P.2d 397 (1974), the leading case in Kansas regarding K.S.A. 60-455 evidence, i.e. evidence of other crimes. The court in *Irons* stated:

> Where a previous judgment of acquittal is based upon a general verdict this approach requires a court to examine the record of the prior proceedings, taking into account the pleadings, evidence, charge and other relevant matters, and if the court concludes a rational jury would have had to base its verdict of acquittal on the same issue which the state seeks to prove by introducing evidence of a prior offense then collateral estoppel applies. *Irons,* 230 Kan. at 143-144.

Here, the trial judge carefully followed the dictates of *Darling* and *Irons* by reviewing the record and transcripts of the *Hinkle* trial. The court properly found that the jury in the *Hinkle* case did not have to base its verdict upon the same issue which the State sought to prove in the *Eppler* case. The judge ruled the prior jury could have based its decision on the credibility of the Hinkle children or additional factors other than motive, intent, or lack of mistake or accident. The court allowed the State to introduce the *Hinkle* evidence on the issues of motive, intent, and lack of mistake or accident, pursuant to K.S.A. 60-455.

In child sexual abuse cases credibility of the child is of paramount importance. Many adults feel that children fantasize such experiences, while such is usually not the case. The trial judge carefully balanced the competing interests of prejudice versus probative value and correctly ruled that the *Hinkle* evidence should be admissible for the limited purpose of motive, intent, or lack of accident or mistake.

Petitioner attempts to make much of the Eleventh Circuit Case, *Albert v. Montgomery,* 732 F.2d 865 (11th Cir. 1984), which does nothing more than state the minority position. See *Evidence—Other Offense—Acquittal,* 86 ALR 2d 1132, and *Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of the Offenses,* 25 ALR 4th 934.

Finally, the jury was given a limiting instruction as to how to properly consider the *Hinkle* evidence. (See appendix A). This limiting instruction prohibited petitioner from being unduly prejudiced or having to twice "run the gauntlet" for the same criminal conduct.

CONCLUSION

For the reasons previously stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 1986, I authorized service of three copies of the above Respondent's Brief in Opposition upon David R. Gilman and James F. Vano, 7134 W. 80th Street, Overland Park, Kansas 66204 and the Honorable Robert Stephan, Kansas Attorney General, Kansas Judicial Center, Topeka, Kansas 66612 by having the same, so addressed, deposited in the United States Mail, postpage prepaid.

STEPHEN R. TATUM

APPENDIX

APPENDIX A

INSTRUCTION NO. 6

Evidence has been admitted tending to show that the defendant committed crimes other than the present crime charged. This evidence may be considered solely for the purpose of proving the defendant's motive, intent, or absence of mistake or accident.